Filed 5/31/22 In re B.D. CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re B.D., a Person Coming Under the Juvenile Court Law.	C094329
BUTTE COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, Plaintiff and Respondent, v. G.W., Defendant and Appellant.	(Super. Ct. No. 20DP00288)

George W. (father) appeals from the juvenile court's dispositional orders removing the minor from parental custody and bypassing him for reunification services. (Welf. & Inst. Code, §§ 361, 395.)[1] He contends the juvenile court erred in failing to find

[1] Undesignated statutory references are to the Welfare and Institutions Code.

him the minor's presumed father under the principles of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816 (*Kelsey S.*) or, alternatively, in failing to provide him with discretionary reunification services. He also contends the Butte County Department of Employment and Social Services (Department) and the juvenile court failed to comply with the inquiry and notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We will affirm the juvenile court's orders.

BACKGROUND

On December 17, 2020, the Department filed a section 300 petition on behalf of the newborn minor alleging the minor was at substantial risk of harm due to mother's ongoing substance abuse. The petition also alleged the minor had been left with no provision for support, as mother's whereabouts were unknown and the alleged father was currently incarcerated and unable to arrange for the care of the minor. As mother is not a party to this appeal, we do not discuss her actions in detail; it suffices to say at this point that she had not received prenatal care, had admitted to smoking heroin throughout her pregnancy, and tested positive (as did the minor) for methamphetamine and opiates at the time of the minor's birth.

Father, then age 22, had already been convicted of several felonies as an adult and sentenced to prison on two separate occasions. He was currently in jail on multiple charges and violation of postrelease community supervision and had been in custody since May 15, 2020. On December 2, 2020, while in custody and mere weeks before the minor's birth, he had been charged with the additional crime of battery causing serious bodily injury.

The detention report stated mother's whereabouts were unknown and father was incarcerated and inaccessible due to COVID-19 restrictions; thus, neither had been interviewed regarding the ICWA. In a previous case regarding the minor's half sibling (who is not involved in this case), mother had reported a connection with the Cherokee and Blackfoot tribes. The juvenile court found reason to believe the minor may be an Indian child and ordered the Department to complete further inquiry as required by

section 224.2 and to file evidence of its inquiry; the Department sent notice to the Cherokee and Blackfeet[2] tribes containing mother's ancestry information.

Father was present in custody at the February 4, 2021, jurisdiction hearing. He confirmed he was neither present at the minor's birth nor married to mother at that time, he had not been identified by a court of law as the father, and he was not sure whether he was listed on the birth certificate. He said he had Cherokee ancestry and believed his grandmother had obtained a roll number for him with the Cherokee Nation. The Department reported that per the Cherokee Nation neither father nor the minor was enrolled, but the minor may be eligible and the Department would be providing amended notice to the Cherokee Nation.

Prior to the hearing, the juvenile court had authorized DNA testing at father's counsel's request. At the conclusion of the hearing, the court sustained the allegations and again found reason to believe the minor may be an Indian child.

The disposition hearing was continued several times to obtain the DNA results. The Department had provided amended notice to the Blackfeet and Cherokee tribes including father's ancestry information; the Cherokee Nation confirmed the minor was eligible for enrollment through the paternal great-grandmother but was not the biological child of an enrolled member (as father was not enrolled). Thus, the Cherokee Nation did not consider the minor to be an Indian child.

On May 12, 2021, the Department filed a report that included a copy of the DNA results proving father was the minor's biological father. It recommended reunification services not be offered to father because the services would not benefit the minor, pointing out that at five months old and detained since birth the minor had never even

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[2] Although mother reported she was of Cherokee and *Blackfoot*, notice was sent to the *Blackfeet* tribe. "[T]here is frequently confusion between the Blackfeet tribe, which is federally recognized, and the related Blackfoot tribe, which is found in Canada and thus not entitled to notice of dependency proceedings. When Blackfoot heritage is claimed, part of the Agency's duty of inquiry is to clarify whether the parent is actually claiming Blackfoot or Blackfeet heritage." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.)

seen father, who remained incarcerated and would most likely be incarcerated for the duration of the time allotted for reunification.

At the June 3, 2021, disposition hearing, the juvenile court found father was the biological father. The social worker testified there had been no visits between father and the minor, as the jail was not permitting children to visit due to COVID-19. Members of father's family had visited the minor. Father had not been present at the minor's birth, had no preexisting relationship with the minor, and had never provided for the minor. Father had asked the maternal grandmother about the minor and had wanted to visit with him. The social worker did not know how long father would be incarcerated based on his pending charges and knew only that he had another court date in October 2021.

Father's counsel provided the following offer of proof, set forth below in its entirety, to which father indicated he agreed:

"If called to testify, [Father] would testify that he's known from the beginning that he was the father of [the minor]. He requested DNA testing in order to confirm this so that his child could get benefits through the Cherokee Nation if he's determined to be an Indian child. His grandmother on his father's side is an enrolled member of the Cherokee tribe, and he's always understood that he is eligible for enrollment. However, he has needed to make application. And in order to make application, Father needs to have his birth certificate and the birth certificate of his father, which he hasn't been able to obtain since being in custody. It's his understanding that [Children's Services Division] has requested these birth certificates, so he's hoping that that's forthcoming. [¶] He was told by the social worker that he was going to get services, but then the report indicated differently. [¶] He calls the caregiver collect and on his own card one to two times a week to find out how his child is doing. And the caregiver lets him speak to the child as best he can [to] a little infant over the phone. He feels that the child is getting to know his voice, and he appreciates the caregiver allowing him this contact. He has not been able to visit, have an in-person visit with his child. He wants very much to be a part of his son's life. [¶] He's disturbed that the mother is not stepping forward for this child. He has been asked by Children's Services to do classes, and he's participated in every

opportunity that's been provided to him to do that while at the jail. He's concerned that he hasn't been able to visit due to Covid and is hoping that that gets lifted soon. [¶] He's working to resolve his criminal matters. His criminal attorney has talked to him recently about getting into a program, and he's willing to get into a program if that becomes a possibility for him. [¶] He very much wants to continue establishing a relationship with his child, doing any services that Children's Services gave him to do, and to work towards becoming a presumed father to his child. [¶] That's it."

The Department argued father did not qualify as a presumed father entitled to reunification services and, as a biological father for whom the provision of services is discretionary, should not be provided services as they would not benefit the minor. Father's counsel requested the court offer father services as a *Kelsey S.* father, arguing he had "stepped forward from the beginning and demonstrated a full commitment to his child as best he can [while] incarcerated." Counsel noted father was in contact with the caregiver several times a week to obtain status updates and speak to the minor to attempt to familiarize the minor with his voice. Counsel argued there was no *harm* to the minor to offer father discretionary services, noting he had "stepped up far more than the mother and she's not incarcerated." The Department responded that father was not thwarted from fulfilling his parental obligations by some third party but instead had been thwarted by his own poor choices resulting in his incarceration.

At the conclusion of argument, the juvenile court recognized father had been "cooperating with CSD, doing the Parent Engagement packets, calling the caretaker once or twice trying to establish a relationship," but also that he had been incarcerated since May 2020 and has been involved in a fight at the jail since then, resulting in a new charge of "serious battery to another individual." Noting that father had never seen the minor and had no relationship with him, as well as that there was a "high likelihood that [father's] incarceration may exceed the time allotted for reunification," the court found that services would not benefit the minor and declined to order them. The court added that it had "review[ed] *In Kelsey S., In Re Zacharia D.*, which is at [(1993)] 6 Cal.App.4th 435, and the case *In Re Sarah C.* [(1992) 8 Cal.App.4th 964] that was

mentioned by [the Department]." The court also reminded counsel for the Department to "follow up with getting the birth certificates, because we need to find that out," implicitly referencing the ICWA requirements.

The written removal order stated that father was an alleged father and there is no statutorily presumed father; it added that reunification services to the biological father would not benefit the minor. Mother was provided reunification services and a review hearing was set for November 4, 2021. Other than noting that the court and the social worker had asked the parents, paternal great-grandmother, and the maternal grandmother about the minor's possible Indian ancestry, the court made no further ICWA findings in its orders.

Father timely appealed from the disposition order in June 2021. The briefing was continued multiple times for record augments and briefing extensions; the case was fully briefed and assigned to this panel in January 2022. The parties waived argument and the case was submitted May 5, 2022.

DISCUSSION

I

Denial of Reunification Services

Father contends the juvenile court erred when it declined to find he qualified as a *Kelsey S.* father, which would have entitled him to reunification services, and, alternatively, in exercising its discretion to deny him reunification services as a biological father.[3] In making his initial arguments, father intertwines the two findings (denial of *Kelsey S.* status and denial of reunification services as a biological father) in a manner that confuses the issues and requirements associated with each of the two claims. We address each issue separately and find no error in the juvenile court's rulings.

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[3] Father also initially argued reversal was required because the juvenile court failed to comply with section 316.2 and California Rules of Court, rule 5.635, but subsequently withdrew this contention.

A. *Appealability*

Preliminarily, we reject the Department's contention that father is precluded from challenging the juvenile court's June 3, 2021, ruling denying him *Kelsey S.* status in this appeal due to lack of specificity in his notice of appeal.

" '[I]t is, and has been, the law of this state that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what [the] appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced.' [Citations.] A notice of appeal 'is sufficient if it identifies the particular judgment or order being appealed.' " (*In re Joshua S.* (2007) 41 Cal.4th 261, 272; see also *Girard v. Monrovia City School District* (1953) 121 Cal.App.2d 737, 739-740.)

Father's notice of appeal named the "June 3, 2021 order denying family reunification services to father" as its subject. Father also checked boxes indicating he was appealing the section 360 declaration of dependency and removal from custody and listed nine hearing dates, the last of which is June 3, 2021. Although father did not specifically identify the juvenile court's paternity finding denying him *Kelsey S.* presumed father status in his notice of appeal, that ruling is fairly included in the notice of appeal, as he was seeking *Kelsey S.* status as a basis for his entitlement to reunification services, and he was denied *Kelsey S.* status at the June 3, 2021, hearing identified on his notice of appeal. Thus, it is "particularly appropriate" to construe the notice of appeal to include the denial of *Kelsey S.* status. (*In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1017.) Further, the Department does not argue or otherwise suggest it was misled or prejudiced by the lack of specificity. Accordingly, we construe father's notice of appeal to include appeal from the juvenile court's June 3, 2021, ruling denying father *Kelsey S.* status.

B. *Denial of* Kelsey S. *Status*

"There are three types of fathers in juvenile dependency law: presumed, biological, and alleged. [Citation.] A presumed father is a man who meets one or more specified criteria in [Fam. Code] section 7611. A biological father is a man whose paternity has been established, but who has not shown he is the child's presumed father.

An alleged father . . . is a man who has not established biological paternity or presumed father status." (*In re P.A.* (2011) 198 Cal.App.4th 974, 979.) Because presumed status comes with the right "to appointed counsel, custody (if there is no finding of detriment) and reunification services," it " 'ranks highest' " amongst the three. (*Id.* at p. 980.) " 'The statutory purpose of [Fam. Code, § 7611] is to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.' " (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) The presumptions in Family Code section 7611 are driven by the state's interest in the welfare of the child and the integrity of the family. (*In re Nicholas H.* (2002) 28 Cal.4th 56, 65.)

Family Code section 7611, subdivision (d) presumes parentage if "[t]he presumed parent receives the child into their home and openly holds out the child as their natural child." This presumption recognizes that a familial relationship resulting from years of living together in a purported parent/child relationship is worthy of strong consideration. (See *In re Nicholas H., supra*, 28 Cal.4th at p. 65.) A presumed father pursuant to *Kelsey S.* is an individual who has not satisfied the section 7611, subdivision (d) conditions classifying him as a presumed father, but nonetheless has promptly come forward and made a full commitment to his parental responsibilities, emotional, financial, and otherwise; however, a third party has thwarted his attempt to achieve presumed parent status by preventing him from assuming his parental responsibilities or physically receiving the child into his home. The factors to consider in determining whether a man qualifies as a *Kelsey S.* father are his "conduct before and after the child's birth, including whether he publicly acknowledged paternity, paid pregnancy and birth expenses commensurate with his ability to do so, and promptly took legal action to obtain custody of the child. [Citation.] He must demonstrate a full commitment to his parental responsibilities within a short time after he learned that the biological mother was pregnant with his child. [Citation.] He must also demonstrate a willingness to assume full custody." (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 583.)

"From the precise language used by the court in *Kelsey S.* and as demonstrated by the holding in the later Supreme Court case of *Adoption of Michael H.* (1995) 10 Cal.4th

1043 (*Michael H.*), there are at least two elements of 'full commitment': (1) a demonstration of a willingness to financially support the child and (2) a willingness—at least to the extent she makes possible—to emotionally support the unwed mother during her pregnancy." (*Adoption of T.K.* (2015) 240 Cal.App.4th 1392, 1394, italics omitted.) "This is so because 'the mere existence of a biological link does not merit . . . constitutional protection' [citation]; rather, the federal Constitution protects only the parental *relationship* that the unwed father has actively developed by ' "com[ing] forward to participate in the rearing of his child" ' [citation] and 'act[ing] as a father' [citation]." (*Michael H.*, at p. 1052.)

"When deciding whether a parent meets the requirements under *Kelsey S.*, appellate courts have reviewed the ruling for substantial evidence. [Citations.] The burden is on the biological parent 'to establish the factual predicate' for *Kelsey S.* rights. [Citation.] To the extent that the issue is a mixed question of law and fact, we exercise our independent judgment in measuring the facts against the applicable legal standard. [Citation.]" (*In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1539.)

Father did not meet his burden to establish a factual predicate here.

First, "in order to be entitled to equal protection of his parental rights, an unwed father must, '[i]n particular . . . , demonstrate "a willingness *himself* to assume *full* custody of the child—not merely to block adoption by others." ' " (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 681.) In the present case, father did not seek to assume full custody of the minor, or even seek legal custody while relegating physical custody to others (such as his parents) until he was released from incarceration. Thus, he did not meet the requirements to be considered a presumed father pursuant to *Kelsey S.* (*Ibid*.)

Second, father was not thwarted from being able to meet the requirements to achieve presumed parent status by a third party. He was unable to meet the requirement that he receive the minor into his home as a result of his own conduct, leading to his incarceration. Father acknowledges that the court in *Adoption of O.M., supra*, 169 Cal.App.4th 672 "unsurprisingly held that father's wilful [*sic*] criminal conduct with its inevitable results (that is, his incarceration)—while he was supposed to be assuming

parental responsibility—could be used to determine whether he demonstrated a full commitment to his parental responsibilities." He argues, however, that the principles set forth in that case do not apply to him because "there is no evidence in the record that any offending conduct or purported criminality, was after he knew or should have reasonably known of the pregnancy." But this statement of the record is not accurate. While father may not have known of the pregnancy when he was initially incarcerated in May 2021, the record reflects he was charged with battery with serious bodily injury, while in custody, shortly before the minor's birth and despite knowing he was about to become a father "from the beginning." And while we certainly agree that the law does not include a "go to jail, lose your child" policy, father's continued engagement in willful criminal conduct that may well extend his period of incarceration is inconsistent with demonstrating a full commitment to his parental responsibilities. *(In re S.D.* (2002) 99 Cal.App.4th 1068, 1077; *Adoption of O.M.,* at p. 680 [no constitutional principle prevents court from "holding an unwed father's own criminal activity against him when assessing whether he has met the criteria for *Kelsey S.* rights"].) Father also argues that his incarceration should not be considered because he is still awaiting trial, has not been convicted, and maintains his innocence. But in the juvenile court father presented evidence he was working to resolve his criminal matters and was willing to get into a program. He did not maintain his innocence, but instead argued that he could possibly "get out in a program and be on probation."

In any event, even assuming without deciding that father's incarceration can constitute thwarting by a third party due to his inability to live with the minor, he has failed to demonstrate that his incarceration prevented him from *otherwise* promptly coming forward and making a full commitment to his parental responsibilities--emotional, financial, and otherwise--commensurate with his abilities. Father presented no evidence that he took any steps to offer *any* financial or emotional support to mother during the pregnancy, even if his offerings would have been limited due to his incarceration. There is no evidence that he checked on mother while she was pregnant, helped her arrange prenatal care or address her substance abuse problem, helped her

acquire the support she would have needed to care for the minor, or even attempted to do any of these things. He presented no testimony or evidence he ever stated or otherwise demonstrated to mother or anyone else that he wanted to parent and help raise his child. He presented no evidence that he publicly acknowledged paternity, attempted to sign a voluntary declaration of paternity, or that he made arrangements to assume custody of the minor or arrange for his family to do so once the minor was born. It does not appear father did anything at all to acknowledge his parenthood, let alone fully commit to it, prior to the minor's birth and detention, even within the confines of his incarceration.

While father may have shown some interest in the minor after birth, the Supreme Court has held that a parent cannot compensate for his lack of demonstration of a " 'full commitment' to parenthood during pregnancy . . . by attempting to assume his parental responsibilities [after birth or] many months after learning of the pregnancy." (*Michael H., supra*, 10 Cal.4th at p. 1054, italics omitted; *id*. at pp. 1054-1055.) And here, father was *still* not making a full commitment to parenthood by seeking full custody (even if only through his relatives); instead, he merely "want[ed] to continue establishing a relationship with his child, . . . and [work] towards becoming a presumed father to his child." The evidence supports the juvenile court's denial of father's request to be deemed a presumed father pursuant to *Kelsey S*.

C. *Denial of Reunification Services as Biological Father*

Father also argues the juvenile court erred in declining to order reunification services for him under section 361.5, subdivision (a) as the minor's biological father. Although this issue is not properly headed and argued until raised in the reply brief, we will nonetheless address it. As we next explain, father's argument fails to persuade.

"A biological father may receive reunification services only if the court finds that granting him services would benefit the child." (*In re Elijah V., supra*, 127 Cal.App.4th at p. 589; see also *In re O.S.* (2002) 102 Cal.App.4th 1402, 1410; § 361.5, subd. (a).) "It is the parent's burden to prove that the minor would benefit from the provision of court-ordered services." (*Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1124.) The juvenile court's decision to deny optional reunification services to a non-presumed

but biological father is reviewed for abuse of discretion. (*In re Elijah V.,* at pp. 588-589.) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

Here, father made no showing how providing him with reunification services would *benefit* the minor. He merely stated he wanted to be a part of the minor's life and had "stepped up far more than mother," adding that it would *not harm* the minor to offer him services. He presented no evidence that he was prepared to play a parental role in the minor's life or of any probability of successful reunification.

Father complains his incarceration was not properly considered in declining to provide services because he had not yet been convicted. But the juvenile court did not decide reunification services would not benefit the minor because father was a convicted felon. We reject father's premise that the court "relied upon the mere existence of charges" to deny reunification services. As we have set forth *ante*, the court stated only that father was *incarcerated* and was likely to remain incarcerated for most (if not all) of the reunification period. Indeed, the social worker testified father's next criminal court date was in October 2021, only a month before the six-month review would properly be conducted.

Father argues there was "no evidence that [he] would not be released during the time allotted for reunification" and notes he was willing to participate in "a program" if one were offered. But it was *father's* burden to show reunification services were in the minor's best interest and, therefore, his burden to show he was likely to be released in time to benefit from reunification services. Father provided no evidence he had been offered any release program and whether one might be offered is speculative; as father acknowledges, "speculation is not competent evidence." Further, should favorable circumstances arise, father could request services in the future.

Finally, we reject father's argument that he was entitled to services because even if he were incarcerated for the entire reunification period, "that does not mean that he could

not arrange for the safe care of his child during that period." Father's citation to *In re Isayah C.* (2004) 118 Cal.App.4th 684 is inapposite. Here, unlike *In re Isayah C.*, the minor was not removed from father as the custodial parent and he had not made suitable arrangements to have the minor cared for until his release from custody. Here, father presented no evidence that there were any paternal relatives or other suitable individuals with whom he had arranged or could arrange care for the minor, or even who might have had an interest in placement of the minor during father's incarceration.

It was father's burden to prove reunification services were in the minor's best interests. Given the absence of any significant relationship between father and the minor, father's projected period of incarceration, and the lack of evidence that father was prepared to play a parental role in the minor's life or of any probability of successful reunification, the juvenile court's decision to deny reunification services to father was not an abuse of discretion.

II

ICWA Compliance

Father claims the Department failed to fully comply with the ICWA's inquiry and notice requirements because it did not fully interview the parents, did not file copies of correspondence exchanged with the Cherokee Nation, and omitted some of the known familial background information on the notices it sent to the tribes.

The ICWA imposes certain inquiry and notice requirements if there is a "reason to know" or a "reason to believe" a child is an Indian child. There is a "reason to know" if any of the circumstances under section 224.2, subdivision (d) are met, generally where the court has direct and reliable knowledge the child is an Indian child (§ 224.2, subd. (d)(1)-(6)). A reason to know triggers a court's obligation to confirm whether the child is an Indian child, and the court must treat the child as an Indian child until it determines otherwise. (§ 224.2, subds. (g), (i)(1).) The notice provisions of section 224.3 must also be complied with. (§ 224.3, subd. (a).) Here, the juvenile court had not found a "reason to know" the minor is an Indian child. Thus, the notice provisions of section 224.3 did not apply.

"Reason to believe" exists when there is some indication the child may be an Indian child, but there is no direct knowledge establishing reason to know. (*In re M.W.* (2020) 49 Cal.App.5th 1034, 1044-1045.) A reason to believe triggers the inquiry provisions under section 224.2, subdivision (e), which require: (1) interviewing parents and extended family; (2) contacting the Bureau of Indian Affairs and the State Department of Social Services to help identify contact information "of the tribes in which the child may be a member" and "contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership status or eligibility"; and (3) "[c]ontacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility." (§ 224.2, subd. (e); *In re D.S.* (2020) 46 Cal.App.5th 1041, 1052-1053.)

Here, the juvenile court determined there was adequate information to establish a reason to believe the minor is an Indian child. To that end, the Department commenced further inquiry by contacting tribes, gathering and sharing information, and attempting to assist father in submitting an enrollment application to the Cherokee Nation. But, as father repeatedly notes, the juvenile court did not make any other ICWA findings or determine that the ICWA applied or did not apply to the proceedings. Rather, the record before us indicates the Department was in the process of complying with the ICWA inquiry and notice provisions, probing the minor's possible Indian ancestry, and assisting father with the process of applying for membership/enrollment.

Because the juvenile court had not yet made any specific findings about the applicability of the ICWA to enter the orders at issue on this appeal, father's contention of error is premature. The inquiry into the minor's heritage is incomplete and any opinion we could give on the adequacy of the inquiry and/or notice would be advisory. (See *People v. Buza* (2018) 4 Cal.5th 658, 693 ["We . . . abide by . . . a ' "cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more" ' "]; cf. *Safai v. Safai* (2008) 164 Cal.App.4th 233, 242-243 ["The Trustees have advanced no particular reason why this court should rule on those objections in the

first instance, when there is nothing to indicate that the trial court will not fulfill its duty at some future time"].) We see no ICWA error on the incomplete record provided to us.

DISPOSITION

The juvenile court's orders are affirmed.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.